SUPREME COURT, U. S.
MAY 1968
JOHN F. DAVIS, CLERK

NO. [redacted] 85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

WHITNEY STORES, INC., and
ROBERT H. JOHNSON,
Appellants

versus

T. KENNETH SUMMERFORD, Solicitor for the Twelfth Judicial Circuit of the State of South Carolina, E. A. McLEOD, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate,
Respondents

and

BELK'S DEPARTMENT STORE OF CAMDEN, SOUTH CAROLINA, INC., COLLINS DEPARTMENT STORES, INC., and SOUTH CAROLINA RETAIL COUNCIL, INC.,
Intervenor-Respondents

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, convened as a three judge Constitutional Court (App., infra, pp. 1a-12a) is reported at — F. Supp. —.

JURISDICTION

Appellants instituted this action in the District Court of the United States for the District of South Carolina seeking injunctive relief against a pattern of discriminatory enforcement of section 64-2 through 64-2.5 of the 1962 Code of Laws (as amended) of the State of South Carolina, and seeking a declaratory judgment that such code sections are unconstitutional. The statutes in question make it generally unlawful to engage in work on Sunday and prohibit the sale of certain items on Sunday. Judgment of the District Court (App., infra, pp. 1a-12a) was entered February 12, 1968, and notice of appeal was filed March 12, 1968, in the District Court of the United States for the District of South Carolina. This Court has jurisdiction of this appeal made under 28 U. S. C. sec. 1253. *St. John v. Wisconsin Employment Relations Bd.*, Wis. 1951, 71 S. Ct. 375, 340 U. S. 411, 95 L. Ed. 386. *U. S. v. Georgia Public Service Commission*, Ga. 1963, 83 S. Ct. 397, 371 U. S. 285, 9 L. Ed. (2d) 317.

STATUTE INVOLVED

The provisions of section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp.), are set forth in full as footnote three in the opinion of the court below and may be found in Appendix, infra, pp. 3a-5a.

QUESTIONS PRESENTED

Does section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp), in prohibiting the Sunday sale of certain articles while at the same time permitting the sale of certain other articles, make such vague arbitrary and discriminatory classification as to violate the equal protection clause of the Fourteenth Amendment of the United States Constitution?

Are sections 64-2 through 64-2.5 of the 1962 Code of Laws oof South Carolina, as amended (1967 Supp.), so vague, arbitrary, discriminatory and without rational relationship to the object sought to be accomplished as to violate the due process clause of the Fourteenth Amendment to the United States Constitution?

Are sections 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina, as amended (1967 Supp.), being administered so arbitrarily and discriminatorily against appellants as to render their administration violative of 42 U. S. C. sec. 1983, and constitute a denial of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution?

STATEMENT

This action was commenced by filing of a complaint dated October 26, 1967, in which the plaintiff-appellants state three causes of action.

In the first cause of action they seek an injunction *pendente lite* and permanently against the respondents from alleged discriminatory enforcement of the Sunday closing laws commonly called the "Blue Laws".

which are contained in Section 64-2, et seq., of the 1962 Code of Laws of South Carolina, upon the grounds that they have been subjected to arrest and harassment while their competitors have not been arrested for similar sales on Sunday over a two-year period prior to institution of this action, in violation of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States of America.

In the second cause of action in addition to an injunction, appellants seek a declaratory judgment that Section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina are unconstitutional because they deny the appellants equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States of America because they deprive the appellants of liberty or property without due process of law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States of America; and for the reason that the sections of the South Carolina Code are unconstitutional under the Eighth and Fourteenth Amendments of the Constitution of the United States of America in that they impose an unusual punishment and thereby deprive the appellants of due process of law.

In the third cause of action appellants seek an injunction against the respondents from discriminatory enforcement of section 64-2 through 64-2.5 of the 1962 Code of Laws of South Carolina in violation of a federal statute (42 U. S. C. 1983) and the Fourteenth Amendment of the Constitution of the United States of America.

A rule to show cause was issued by the Honorable Robert W. Hemphill, United States District Judge,

on October 26, 1967, ex parte, with the explanation that because of the commitment of the court a hearing could not be held on the issuance of a temporary restraining order until November 26, 1967, upon the condition that the defendants might move at anytime upon three (3) days' notice to dissolve the temporary injunction. Thereafter on November 22, 1967, Judge Hemphill continued the temporary injunction upon agreement of the parties that the entire case including permanent injunctive relief be heard by a three-judge court and that the temporary restraining order be continued upon the same terms stated in the order of October 26, 1967. By order of Chief Judge Clement F. Haynsworth, Jr., a three-judge court was constituted in accordance with the provisions of Section 2284, Title 28, United States Code of Laws. Prior to November 22, 1967, respondents were represented by T. Kenneth Summerford, Solicitor of the Twelfth Judicial Circuit. On November 22, 1967, on motion of the Honorable Daniel R. McLeod, Attorney General of South Carolina, who entered an appearance on behalf of the respondents a consent order was issued extending the time within which the respondents might answer or otherwise plead until December 12, 1967. On December 8, 1967, the Attorney General filed a motion to dissolve the temporary restraining order upon various grounds, and an answer was filed on behalf of the appellants on December 12, 1967. The answer states three defenses. The first constitutes a general denial.

The second defense alleges that an action entitled "Whitney Trading Corporation, Plaintiff, versus Robert E. McNair, Governor of South Carolina, J. B. Strom, Chief of South Carolina Law Enforcement Division, E. A. McLeod, Sheriff of Florence County, and T. E. Rogers, Jr., Magistrate, Defendants," now

on appeal to the Supreme Court of South Carolina, raises issues which are identical with those raised in the instant case, the respondents interpose the defense of abstention by the Federal Court pending the appeal and upon its conclusion the defense of *res adjudicata.*

The third defense alleges that Whitney Stores, Inc., has not complied with the laws of the State of South Carolina because it has not received authorization to do business in this state, it is deprived of any right of equitable relief. At a pre-trial conference with Judge Hemphill on December 19, 1967, it was established that Whitney Stores, Inc., is in fact a South Carolina corporation and has complied with the corporate laws of this state. It was agreed between counsel that the testimony would be taken in the form of depositions on December 27, 1967. Pursuant to that agreement depositions were taken on December 27, 1967, and numerous exhibits were received. Appellants had prior to the hearing served notice for admissions and requests for answers to interrogatories upon all of the respondents and the answers of the respondents constitute a part of the record in this case.

Belk's Department Store of Camden, South Carolina, Inc., Collins Department Store, Inc., and South Carolina Retail Council, Inc., filed a motion on January 5, 1968, seeking to intervene upon the ground that the statutes drawn in question vitally affect the future operation of their businesses, and were by order of Judge Hemphill dated January 12, 1968, allowed to intervene for the purpose of making argument before the three-judge court. In the answer of the intervenors, it is alleged that they have insufficient information as to the first and third causes of action and therefore deny same. With regard to the second cause of action, they allege that the classifications estab-

lished by the Sunday closing law are fair and reasonable and comply in all respects with the Constitution of the United States of America; and in any event if they are unconstitutional they are separate and in an external part of the regulatory scheme prohibiting the conduct of business on Sunday, and all other provisions of the South Carolina Sunday closing law are valid and constitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Initially it must be stated that the court below refused to consider the constitutionality of the statutes in question limiting its decision to a discussion of the jurisdictional issue and other questions raised. The reason for this grew out of the court's interpretation of the decision in *Solomon v. South Carolina*, 382 U. S. 204, 86 S. Ct. 396, 15 L. Ed. (2d) 270, it being felt that the Solomon decision "substantially forecloses the question here of due process or equal protection." (App., infra, p. 8a.)

Solomon v. South Carolina (Ibid.) was an appeal from the Supreme Court of South Carolina following a conviction of Aaron Solomon for violation of the same statutes here in issue. In a per curiam decision the Supreme Court of the United States dismissed the appeal for want of a substantial federal question. However, examination of appellant's Jurisdictional Statement reveals that the sole question presented to this court in the *Solomon* case was "Whether section 64-2 of the 1962 Code of Laws of South Carolina, as amended (1964 Supp.), making it unlawful to engage in work on Sunday and prohibiting the sale, or offering for sale, of certain items on Sunday, violates the constitutional guarantee of free exercise of religion

as set forth in the First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, when applied to appellant, an observing and practicing Orthodox Jew who, in accordance with the requirements of his religious belief, does not engage in work or labor on Saturday and keeps his place of business closed on Saturday." (Jurisdictional Statement of Appellant, No. 588, October Term, 1965.)

It is evident that only the Sabbatarian issue of Sunday closing laws was considered in dismissing the *Solomon* case for want of a substantial federal question. There is nothing to sustain the view of the court below that the issue of commodity classification as embodied in the South Carolina Sunday Closing Law has received the stamp of approval of the United States Supreme Court.

To be sure, the constitutionality of allowing the sale of certain items on Sunday and prohibiting the sale of others has already been drawn into question before this Court. *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. (2d) 393 (1961; and *Gallagher v. Crown Kosher Super Mkt.*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. (2d) 536 (1961). State legislatures are given wide discretion in drawing such statutes. Nevertheless, it is recognized that such commodity classification must be reasonably calculated to accomplish the desired purpose of the statute, that being a uniform day of rest. It is also a recognized principle of law that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). These two aspects of the South Carolina

Sunday Closing Laws have never been examined by this Court. Unlike *McGowan v. Maryland*, supra, the record in this case is not barren, of any indication that the statutory classification of prohibited and permitted items of sale lacks reasonableness. Nor is it possible to resolve the vagueness of the statutes as a matter of ordinary commercial knowledge or by making an investigation at a nearby beach or any other place as was suggested by Mr. Chief Justice Warren in the *McGowan* case, supra.

The statutes in issue have state wide application in South Carolina and accordingly, affect a large number of people. That the issues presented are substantial is amply shown by the intervention of two large department stores located in other communities than that of plaintiffs and by the intervention of the South Carolina Retail Council, Inc., an organization representative of scattered interests.

Appellants' second contention is that the South Carolina Sunday Closing Law is being arbitrarily and discriminatorily enforced against appellants by local law enforcement officials contrary to the Fourteenth Amendment and 42 U. S. C. 1983. That such conduct on the part of local officials in the enforcement of state laws presents a substantial federal question which warrants the attention of this court was long ago disposed of in the celebrated case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

> In the years long passed a principle was restated thus: "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, mate-

rial to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Respondents' answers to interrogatories and requests for admissions clearly show they had knowledge that the South Carolina Sunday Closing Law was being violated by appellants' competitors throughout the period during which plaintiffs were being harassed with criminal arrests and attempts to close their business by force of injunction. The record also reveals that despite this knowledge by defendants only the plaintiffs have been pursued under these laws in Florence County, South Carolina. The conclusion seems clear that such law enforcement is the "intentional or purposeful discrimination" that is declared to be unconstitutional in *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397 (1944).

CONCLUSION

The questions presented on this appeal (supra p. 5) are substantial federal questions, and the Court should enter an order noting probable jurisdiction and setting the case for briefing and hearing on the merits.

Respectfully submitted.

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May, 1968

APPENDIX